

A Need for Policy on Detainees

Subject Area General

EWS 2006

A Need for Policy on Detainees  
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To  
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07 February 2006

Report Documentation Page				Form Approved OMB No. 0704-0188	
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1. REPORT DATE <b>2006</b>		2. REPORT TYPE		3. DATES COVERED <b>00-00-2006 to 00-00-2006</b>	
4. TITLE AND SUBTITLE <b>A Need for Policy on Detainees</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>United States Marine Corps, Command and Staff College, Marine Corps University, 2076 South Street, Marine Corps Combat Development Command, Quantico, VA, 22134-5068</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT <b>Same as Report (SAR)</b>	18. NUMBER OF PAGES <b>11</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

The Geneva Conventions and their Protocols were not made for conflicts between a state and an international terrorist network. For the most part, they were drafted with traditional armies of nation states in mind. Some have said that we need to rethink these Conventions and amend them. But that is a daunting process and takes many years. And what are soldiers meant to do in the meantime? For many years, the Conventions have set the basic ground rules for the U.S. armed forces in matters related to the treatment of prisoners. The Army has devoted a great deal of effort to implementing and specifying the standards set out in the Conventions in its Field Manuals and [other] manuals about intelligence interrogation. But no one has yet written the book for the rules that apply when the Geneva Conventions do not. That is a very difficult situation. And there has been a lot of confusion about what rules apply to whom, and where.

-Sandra Day O'Connor, October 20, 2005

To date there are no official rules for the handling of Global War on Terrorism (GWOT) Detainees. The United States uses the Geneva Conventions, which was intended for conflicts between nations, as a rough guide but does not afford GWOT Detainees protections which are specified by the Geneva Conventions. Instead various military documents are used to guide the handling of Detainees; however, the most current documents the United States uses are difficult to apply and date prior to the terrorist attacks on 11 September 2001. The United States needs policy that clearly defines status and treatment of GWOT Detainees to avoid abuses, to facilitate prosecution and to maintain credibility.

### **Definitions of Status**

The application of current detention operations is made difficult by the confusion over the differences between Prisoners of War, Civilian Internee and Detainee.

**Prisoners of War** are defined by the Geneva Conventions as:

1. Members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized Resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions.

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.<sup>1</sup>

**Civilian Internees** are defined by Department of Defense as:

1. A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he or she has committed an offense against the detaining power.

2. A term used to refer to persons interned and protected in accordance with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.<sup>2</sup>

**Detainees** are defined by President Bush's military order on November 13, 2001 as:

...any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United State, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.

(2) it is in the interest of the United States that such individuals be subject to this order.<sup>3</sup>

The rights afforded to Prisoners of War and Civilian internees are clearly defined in the Geneva Conventions. There are currently no rights set out in any U.S. policy concerning Detainees. However, Article 5 of the Geneva Convention provides that in the event of any doubt as to whether an individual is entitled to POW status, they shall be afforded POW status, "until such time as their status has been determined by competent tribunal."<sup>4</sup>

### **Outdated Documents**

The most current documents the United States uses are difficult to apply and date prior to the terrorist attacks on 11 September 2001. "DODD 2310.1, Program for Enemy Prisoners of War (EPOW) and Other Detainees" is dated 18 August 1994; "MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees" is dated 01 October 1997; "FM 19-40, Enemy Prisoner's of War,

Civilian Internees, and Detained Personnel" is dated 01 August 2001. All of these documents were written prior to President Bush's military order so they make no reference to the handling of Detainees. This puts U.S. service men and women in a position in which they have to carry out detention operations, which can have effects on the strategic level, without the aid of clear guidance.

### **Treatment and Abuses**

The lack of clear policy has contributed to problems in two detention facilities with separate chains of command separated by thousands of miles.

LTG Anthony R. Jones, who investigated the abuses at the Abu Gharib Detention Facility, listed a lack of training and doctrine as contributing factors to the abuse. "Clearly abuses occurred at the prison at Abu Gharib. There is no single, simple explanation for why this abuse Abu Gharib happened. - Contributing factors can be traced to issues affecting Command and Control, Doctrine, Training, and the experience of the Soldiers we asked to perform this vital mission."<sup>5</sup>

In fact, Sgt Javal Davis, who was sentenced to six months for his actions in the Abu Gharib Detention Facility, confirms LTG Jones's conclusion: "I never saw a set of rules or SOP [standard operating procedures] for

that section - just word of mouth. I did see paperwork provided by the MI [military intelligence] soldiers regulating sleep and meals for some of the MI-hold prisoners."

Similarly, the "Army Regulation 15-6 Final Report" into allegation of abuse at the Guantanamo Bay, Cuba Detention Facility suggested, "a policy-level review and determination of all detainees when not classified as EPWs."<sup>6</sup>

### **Rights Afforded to Detainees**

It is obvious from these glaring examples that policy is needed. Detainees should receive equivalent treatment, in respect to the Geneva Conventions, in areas such as: personal rights to religion, food, shelter, clothing, and medical treatment.

However, Detainees rights will have to differ in some key areas to safe guard the security of the United States. For Example, Al-Qaeda is a terrorist organization, so allowing Detainees to send and receive mail or any other types of communication would be a threat to the safety and security of all Americans. Detainees are considered war criminals, so unlike POWs, who only have to give name, rank, service number and date of birth, they should be interrogated for additional information. Reasonable



coercive measures should be applied to gain information on an attempt to prevent further terrorist acts.

President Bush stated the U.S. policy would be that Detainees would be held accountable to the laws of war and "other applicable laws by military tribunals"<sup>7</sup>, but no further details have been provided to explain how this process will work. The guidance will need to define every aspect of the trials and appeals process, in order to ensure the successful prosecution of guilty Detainees. This guidance would specifically need to state that the information gathered in intelligence interrogations could not be used against Detainees in the trials and appeals process. Detainees should also have a right to counsel, but only after a reasonable amount of time for intelligence interrogations. Detainees should not have access to counsel during the intelligence interrogations because it would slow reaction time to prevent attacks on Americans. Counsel should be provided for Detainees by the United States if they can not provide their own counsel.

After the United States has set up and implemented this policy it should invite outside scrutiny from international organizations such as the International Red Cross and Red Crescent Societies. The one condition, to this scrutiny, would be that the United States is to be

judged on its own policy and not on the Geneva Conventions. This would help ensure that the United States' policies and practices, concerning Detainees, are well known and acceptable by the rest of the world.

### **Conclusion**

The United States has gone far too long without policy to guide the handling of GWOT Detainees. This lack of policy guidance has contributed to abuses and marred the United States' reputation in the international community. Only through the creation of published policy covering all applicable areas of personal rights and the correct application of that policy, will the United States avoid further incidents and gain back the credibility it deserves.

Word Count: 1497

## Notes

1. Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, "Geneva Convention Relative to the Treatment of Prisoners of War." (Washington , DC: U.S. Government Printing Office, 1949): 3

2. Department of Defense, "The Department of Defense Dictionary of Military Terms and Associated Terms." (Washington , DC: U.S. Government Printing Office, 2005): 75

3. Executive Office of the President, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." (Washington , DC: U.S. Government Printing Office, 2001): 1

4. Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 4

5. LTG Anthony R. Jones, "Executive Summary Investigation of Intelligence Activities at Abu Gharib." (Washington , DC: U.S. Government Printing Office, 2004): 3

6. Army Regulation 15-6, "Final Report Investigation of Intelligence Activities at Abu Gharib." (Washington , DC: U.S. Government Printing Office, 2005): 8

7. Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 4

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Department of Defense Directive 2310.1, Program for Enemy Prisoners of WAR (EPOW) and other Detainees. (Washington, DC: U.S. Government Printing Office, 1994)

Marine Corps Order 3461.1, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees. (Washington, DC: U.S. Government Printing Office, 1997)

FM 19-40, "Enemy Prisoner's of War, Civilian Internees, and Detainees Personnel. (Washington, DC: U.S. Government Printing Office, 2001)